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 210. *Chlorophyll hb*



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Homestead, FL 33033

In re Patent No. 5,779,392
Issue Date: July 14, 1998
Application No. 08/719,520
Filed: SYSTEMS FOR CONTAINING AND
COLLECTING OIL SPILLS

ON PETITION

This in response to the petition under 37 CFR 1.378(b), filed January 11, 2012, to accept the delayed payment of the maintenance fees for the above-identified patent. By way of this communication, the Office is requesting more information from petitioner before a decision can be rendered on the petition.

The above-identified patent issued on July 14, 1998. The second maintenance fee could have been paid during the period from July 14, 2005 through January 17, 2006 or with a surcharge during the period from January 18, 2006 through July 14, 2006. Accordingly, the above-identified patent expired on July 15, 2006, for failure to timely remit the second maintenance fee. On January 11, 2012, petitioner filed the present petition under 37 CFR 1.378(b), requesting the acceptance of the late payment of the maintenance fees for the above-identified patent due at 7.5 and 11.5 years.

In the present petition, petitioner asserts: "Due to a series of catastrophic illnesses, which began in 2003, my ability to work was severely limited and resulted in the unavoidable delay in paying my patent maintenance fees." Petitioner provided a brief description of his health issues, accompanied by letters from his treating physicians and medical records.

A petition under 37 CFR 1.378(b) to accept late payment of a maintenance fee must include:

- (1) the required maintenance fee set forth in § 1.20(e) through (g);
- (2) the surcharge set forth in § 1.20(i)(1); and
- (3) a showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed

promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent.

The required showing must enumerate the steps taken to ensure timely payment of the maintenance fee, the date and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly. Furthermore, an adequate showing requires a statement by all persons with direct knowledge of the cause of the delay, setting forth the facts as they know them. Copies of all documentary evidence referred to in a statement should be furnished as exhibits to the statement.

Acceptance of a late maintenance fee under the unavoidable delay standard is considered under the same standard for reviving an abandoned application under 35 U.S.C. 133. This is a very stringent standard. As stated in Section 711.03(c)(II)(C)(2) of the Manual of Patent Examining Procedure:

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.

In re Mattullath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), aff'd, 143 USPQ 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

Section 2590(I) of the Manual of Patent Examining Procedure for explains:

As 35 U.S.C. 41(b) requires the payment of fees at specified intervals to maintain a patent in force, rather than some response to a specific action by the Office under 35 U.S.C. 133, a reasonably prudent person in the exercise of due care and diligence would have taken steps to ensure the timely payment of such maintenance fees. [Ray v. Lehman, 55 F.3d 606, 609,

34 USPQ2d 1786, 1788 (Fed. Cir. 1995).] That is, an adequate showing that the delay in payment of the maintenance fee at issue was "unavoidable" within the meaning of 35 U.S.C. 41(c) and 37 CFR 1.378(b)(3) requires a showing of the steps taken to ensure the timely payment of the maintenance fees for this patent. *Id.* Thus, where the record fails to disclose that the patentee took reasonable steps, or discloses that the patentee took no steps, to ensure timely payment of the maintenance fee, 35 U.S.C. 41(c) and 37 CFR 1.378(b)(3) preclude acceptance of the delayed payment of the maintenance fee under 37 CFR 1.378(b).

In view of the requirement to enumerate the steps taken to ensure timely payment of the maintenance fee, the patentee's lack of knowledge of the need to pay the maintenance fee and the failure to receive the Maintenance Fee Reminder do not constitute unavoidable delay. [See *In re Patent No. 4,409,763*, 7 USPQ2d 1798 (Comm'r Pat. 1988), *aff'd sub nom. Rydeen v. Quigg*, 748 F. Supp. 900, 16 USPQ2d 1876 (D.D.C. 1990), *aff'd*, 937 F.2d 623 (Fed. Cir. 1991) (table), *cert. denied*, 502 U.S. 1075 (1992)).] See also Final Rule entitled "Final Rules for Patent Maintenance Fees," published in the Federal Register at 49 Fed. Reg. 34716, 34722-23 (August 31, 1984), and republished in the Official Gazette at 1046 Off. Gaz. Pat. Office 28, 34 (September 25, 1984). Under the statutes and rules, the Office has no duty to notify patentees of the requirement to pay maintenance fees or to notify patentees when the maintenance fees are due. It is solely the responsibility of the patentee to assure that the maintenance fee is timely paid to prevent expiration of the patent. The lack of knowledge of the requirement to pay a maintenance fee and the failure to receive the Maintenance Fee Reminder will not shift the burden of monitoring the time for paying a maintenance fee from the patentee to the Office.

Thus, evidence that despite reasonable care on behalf of the patentee and/or the patentee's agents, and reasonable steps to ensure timely payment, the maintenance fee was unavoidably not paid, could be submitted in support of an argument that the delay in payment was unavoidable.

In determining whether the delay in paying a maintenance fee was unavoidable, one looks to whether the party responsible for payment of the maintenance fee exercised the due care of a reasonably prudent person. *Ray v. Lehman*, 55 F.3d 606, 608-609, 34 USPQ2d 1786, 1787 (Fed. Cir. 1995). The patent owner at the time of the expiration of the patent is ultimately the person responsible to ensure the timely payment of the maintenance fees. The patent owner may engage another to track and/or pay the maintenance fees; however, merely engaging another does not relieve the patent owner from his obligation to take appropriate steps to ensure the timely payment of such maintenance fees. See *California Medical Prods. v. Tecnol Medical Prods.*, 921 F. Supp. 1219 (D. Del. 1995). In this instance, petitioner was the patent owner at the time of the expiration of the patent, and therefore, petitioner alone had an obligation to ensure the timely payment of the maintenance fee.

As previously stated, an adequate showing that the delay in payment of the maintenance fee at issue was "unavoidable" within the meaning of 35 U.S.C. 41(c) and 37 CFR 1.378(b)(3) requires a showing of the steps taken to ensure the timely payment of the maintenance fees for this patent. However,

petitioner did not submit any statements supported by documentary evidence showing that he had any system in place to ensure the timely payment of the maintenance fees for this patent or that such a system, if employed, was reasonably reliable to notify petitioner of the due dates for payment of the maintenance fees. That is, there is no adequate showing that any steps had been taken with respect to scheduling and paying the maintenance fee by any person.

In the absence of a showing that petitioner was (1) aware of need to pay the second and third maintenance fees and (2) he took steps to ensure timely payment, 37 CFR 1.378(b) precludes acceptance of the payment. In other words, if petitioner was unaware of the need to pay the maintenance fees and no steps were taken by petitioner to track the maintenance fee due dates, then any concurrent and subsequent health problems of petitioner would be immaterial to the delay. The showing must be that when the petitioner's system indicated the maintenance fees fell due, his health problems "unavoidably" prevented him from taking any earlier action with respect to this patent. While the USPTO is aware of the difficulties and hardships involved in this instance, petitioner should include a showing (and copies of documents) that this patent had in fact been entered in a maintenance fee tracking system, and be accompanied by a statement as to how that system operated.

Furthermore, petitioner asserts that his "ability to work was severely limited and resulted in the unavoidable delay in paying in timely paying [his] maintenance fees". The Office reminds petitioner to meet the showing of unavoidable delay, petitioner must demonstrate that his medical incapacitation was of such a nature and degree as to render the patentee unable to conduct business (e.g., correspond with the Office) during the entire period from the maintenance fee was due on July 14, 2006, to the present. For example, how was petitioner able to travel to and from medical appointments, pay his bills, and maintain his affairs during this period of time, but was unable to make timely payment of his maintenance fees. Furthermore, petitioner failed to explain why he did not enlist the aid of others to assist him in managing his patent affairs to ensure the timely payment of the maintenance fee, as a reasonable and prudent person would have done with respect to his most important business.

The Office strongly advises petitioner to redact any personal information in documents submitted to the USPTO that may contribute to identity theft such as social security numbers, bank account numbers, or credit card numbers (other than a check or credit card authorization form PTO-2038 submitted for payment purposes) as such information is never required by the USPTO to support a petition.

The Office notes that the address listed on the petition differs from the correspondence address of record. As a one-time courtesy, the Office is mailing petitioner a copy of this communication at the address on the petition. If petitioner would like future correspondence directed to him, petitioner must submit a change of correspondence address. The appropriate form (PTO/SB/123) is attached.

Petitioner is given **TWO (2) MONTHS** from the mail date of this communication to respond to this request for information and submit the necessary documentation. To avoid any confusion, petitioner should consider using Form PTO/SB/65 provided by the USPTO when responding to this

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Application No. 08/719,520

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communication. No further fees are required when filing the enclosed Form PTO/SB/65 in response to this communication.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petition
 Commissioner for Patents
 P.O. Box 1450
 Alexandria, VA 22313-1450

By FAX: (571) 273-8300
 Attn: Office of Petitions

By hand: Customer Service Window
 Randolph Building
 401 Dulany Street
 Alexandria, VA 22314

Telephone inquiries concerning this matter may be directed to the undersigned at (571) 272-3211.

/Christina Tartera Donnell/

Christina Tartera Donnell
Senior Petitions Attorney
Office of Petitions

Enclosures: Forms PTO/SB/65 and Form PTO/SB/123

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